two decisions reveals that there exists no conflict of the nature involved in the two authorities relied upon by the Government (J.S., p. 8). *United States* v. *O'Malley*, 383 U.S. 627, involved two conflicting interpretations of a provision of the Internal Revenue Code. *Bingler* v. *Johnson*, 394 U.S. 741, involved two conflicting decisions as to the validity of an Internal Revenue Service regulation, the resolution of which conflict required this Court to examine the legislative history of a provision of the Internal Revenue Code and to construe that statute.

The Florida court's disagreement with the opinion of the District Court below was simply by way of dicta. The limited review given by the Florida court and the basis for its decision, as stated in its opinion, was that:

> "Our review under the Administrative Procedure Act, Title 5, U.S.C., Section 706, is limited to ascertaining whether there was substantial evidence in the record for the Commission decision. We find no difficulty in determining that the Commission action was based on substantial evidence." (J.S., pp. 198-199.)

Having thus disposed of the case upon the sole ground of substantial evidence to support the Commission's action, the Florida court then criticized the entirely different matters upon which the District Court below rested its decision in this case—matters which made it unnecessary for that Court to deal with the question upon which the Florida court based its decision.

What the Government is really asking this Court to do is to reject the District Court's opinion below and to substitute therefor the dicta of the Florida court. But, as this Court pointed out in *United States* v. *Champlin Refining Co.*, 341 U.S. 290, 301 (1951), "it is not the function of this Court to rescue the Commission by making findings *de novo* which the Commission itself was unable or unwilling to make." Under the circumstances here, this Court should adhere to its usual "rule of non-interference"

unless it believes the District Court below has not made a "fair assessment" of the report and the record as a whole, or has "misapprehended or grossly misapplied" the applicable principles of law or standard of review. *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396, 400-401 (1957); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491 (1951).

It is important to note that the decree below did not, nor will its affirmance by this Court, strip the Commission of authority to deal with car shortages. It is not barred from conducting further proceedings, receiving additional evidence, and correcting the deficiencies pointed out by the Court. In fact, the Commission has held the investigation and record open for possible further proceedings (J.S., p. 88).

The District Court's injunction has not rendered the Commission impotent. Indeed, Commission counsel argued, the Florida court agreed (J.S., pp. 191-192), and the Jurisdictional Statement says (pp. 4-5), that the order here involved is simply one in an arsenal of weapons being used by the Commission to attack the same problem. Nor is the Commission denied the use of this weapon if wielded upon a proper record.

The arsenal of weapons argument was made by Commission counsel to the District Court below. He besought the District Court below:

> "And I beseech you to view the reasonableness of what the Commission was doing here, ex parte number 241, in the light of what it did in the basic per diem case, the incentive per diem case, and in the exercise of its authority under Section 1(15) of the Act and the emergency provisions."[4]

But the Court below properly considered the Commission's action on the record in this proceeding and this proceeding

---

[4] Excerpt from fourth page of transcript of oral argument by Commission counsel before the Court below.

alone. The order involved in this case is the order entered by the Commission in Ex Parte No. 241 and not "a series of orders" entered in other proceedings as intimated by the Government (J.S., p. 4). A motion to have the proceedings in Ex Parte No. 241 and Ex Parte No. 252, *Incentive Per Diem Charges,* 332 I.C.C. 11, one of the "series" referred to by the Government (J.S., p. 5), consolidated for hearing and disposition on the same record was denied by the Commission's order of August 23, 1966 (App. B, *infra*).[5] Such denial is entirely inconsistent with the argument made below, and now being made by the Government to this Court, that matters in other proceedings pertaining to incentive per diem charges are to be relied upon to sustain the Commission's action in Ex Parte No. 241.

II. The District Court's Opinion Is Clearly Correct And Should Be Affirmed

This Court and lower courts have long recognized that rules or regulations promulgated by an administrative agency must be reasonable and fair. *Universal Camera Corp., supra,* p. 490. A reasonable rule or regulation must serve a useful purpose, bear a real and substantial relation to the objective sought to be obtained, not be harmful or wasteful, and be susceptible of being complied with. *Atlantic Coast Line R. Co.* v. *United States,* 112 F.Supp. 594, 597 (1953); *Palmer* v. *United States,* 75 F.Supp. 63, 68 (1947); and *Iversen* v. *United States,* 63 F.Supp. 1001, 1006 (1946), *aff'd per curiam,* 327 U.S. 767 (1946). The District Court below recognized that the Commission's order prescribing mandatory Car Service Rules 1 and 2 did not meet any of these criteria.

---

[5] Such order recites that it is without prejudice to renewal before that hearing examiner of the portion of the motion objecting to the taking of official notice in Ex Parte No. 252 of the record in Ex Parte No. 241. It is not without significance that, upon renewal of the objection in that proceeding, the examiner ruled that official notice would be taken only of matters identified and submitted at the hearing.

The Commission must make findings that support its decision and those findings must be supported by substantial evidence. See *Burlington Truck Lines,* 371 U.S. 156, 168 (1962), and the cases cited therein. If basic or essential findings are lacking from the Commission's report, the decision must be set aside and the court is not required to resolve opposing contentions as to what the evidence shows. *Soo Line R.R.* v. *United States,* 280 Fed. Supp. 907, 917-918 (D. Minn. 1968); *Florida* v. *United States,* 282 U.S. 194, 215 (1931). The reviewing court is not called upon to ascertain whether, upon the record, the Commission could have made other and adequate findings, since the Commission's order must be upheld, if at all, on the basis articulated by the agency. *Burlington Truck Lines, supra,* p. 169; *American Trucking Ass'ns.* v. *United States,* 364 U.S. 1, 13-14 (1960). Furthermore, the Commission is not relieved of the requirement for basic and adequate findings because of its presumed expertise. *Burlington Truck Lines, supra,* p. 167.

It bears repeating that the District Court below was concerned largely with the absence of essential findings while the Florida court was concerned almost solely with a resolution of opposing contentions as to what the evidence showed. (J.S., p. 198) There is no conflict in the decisions which warrants plenary review of this case.

The Government argues that the District Court below erred in holding that a specific finding of car shortage on the owner-lines was required (J.S., p. 9). In a footnote the Government states that the issue was never raised before the Commission, and thus was not properly before the District Court. The question of an individual railroad's ownership of and need for freight cars was raised early in the proceeding by the Commission itself. In the Interim Report (323 I.C.C. 48), Division 3 of the Commission, at page 48, referred to efforts to obtain specific information from individual carriers and its inability at that time to

determine the adequacy of any individual carrier's fleet. In brief before the Commission the Association argued, and the Examiner agreed, that there was a lack of evidence pertaining to the freight car needs of individual carriers. (Brief before the Commission, p. 6; Examiner's Report, p. 17)

Again, in its Petition for Reconsideration, filed with the Commission on November 3, 1969, the Association raised the following questions and issues:

> "It is not enough for the Division to only say 'we are convinced that there is a continuing freight car shortage' as if it were a matter of common knowledge. How many freight cars are needed? What type of freight car? By which railroad? These and many other related questions remain unanswered and cannot possibly be answered by the evidence of record in this proceeding. (p. 13).
>
> * * *
>
> Mandatory observance of Rules 1 and 2 assumes that freight cars are always needed on the owner's line. This is not true most of the time on predominantly terminating railroads and some of the time on predominantly originating railroads. When cars are not required on the owner's line, there is no necessity that they be handled in accordance with car service rules, if there is a need for them by the non-owners." (p. 84)

The issue of shortages on owner railroads was raised before the Commission on several occasions, but there was never any discussion or finding made by the Commission pertaining to that issue. The District Court below was properly concerned about the Commission's failure to find a specific freight car shortage on the owner lines (J.S., p. 20), especially since the court in *Palmer* v. *United States, supra,* p. 75, considered the absence of an identical finding to be fatal.

The stated purpose of the Commission proceeding was to consider "the prescription of rules designed to alleviate the problem" (J.S., p. 29 and App. A, *infra,* p. 19). The

so-called "problem" is stated to be a "chronic freight car shortage" (App. A, *infra*, p. 18). A freight car shortage is defined by Commission counsel as "an inability to have a needed car in a particular place at a particular time" (Commission's Brief before the District Court, p. 1). The Commission's order prescribing mandatory car service rules has "the primary objective of increasing availability of cars to the owner" (J.S., p. 65) and whether such owner needs them or not (Examiner's Report, p. 23), rather than getting "a needed car to a particular place at a particular time." Only by mere coincidence could the order relieve any such shortage. The District Court noted the absence of railroad or shipper support for the Commission's prescription of mandatory Car Service Rules 1 and 2, even though such was purportedly done for their benefit (J.S., p. 22).

The Government attempts to justify the Commission's action as a "policy determination" that during a period of general shortages all cars must be returned to their owners (J.S., p. 9). Such a policy is inconsistent with previous Commission policy and contrary to the National Transportation Policy (49 U.S.C., preceding § 1), (App. C. *infra*).

When the supply of freight cars is high relative to demand, the movement patterns of freight cars follow that contemplated by the Car Service Rules, with an outbound movement off-line followed by a return movement, empty or loaded, to or toward the owner. But, where there is a freight car shortage, the movement patterns normally do not follow those contemplated under the Car Service Rules. Instead, cars made empty on one railroad are immediately reloaded, regardless of their ownership, and empty mileage and empty car days are reduced to a minimum. As the Commission noted in an earlier proceeding, when this practice is followed in the case of a car shortage it permits the handling of maximum tonnage and in such times mandatory or rigid observance of car service rules must

be shelved as being inconsistent with the maximum utilization of cars. *Car Service, Freight Cars,* 268 I.C.C. 687, 690-691 (1947). The Commission recognized in that proceeding that mandatory observance of Car Service Rules in times of shortage would cause an increase in the empty mileage and empty car days experienced by the carriers, with the result that the aggregate carrying capacity of the fleet could be materially reduced.

It is evident from the foregoing that in Ex Parte 241 the Commission has changed its policy because now it assumes that in times of shortages, cars will be forced back to their owners; low ownership lines will be deprived of the use of cars belonging to others; this will create shortages on the low ownership lines and deprive their shippers of transportation; and the low ownership lines will thereby be compelled to increase their fleets, or else stand embarrassed before their shippers (J.S., pp. 65-66). It appears that the policy of sharing freight cars during shortages is now to be scrapped in favor of the Commission's new policy under which shippers on some railroads would be protected and shippers on other railroads would be made to suffer. Efficient service would be replaced by inefficient service as wasted empty car days and mileage mount. These are not the characteristics of the "adequate, economical, and efficient service" of a "national transportation system" specified by Congress in the National Transportation Policy (App. C, *infra*). Articulation by the Commission is required to explain how such a departure comports with that policy. This Court has held that if the findings do not provide the courts with a basis for determining whether the agency decision comports with the National Transportation Policy, the decision must be set aside. *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 91 (1957).

The concern of the District Court below over the failure of the Commission to give adequate consideration to the financial effects upon the railroads and the shipping public

was well founded. It pointed to the absence of any consideration by the Commission of the financial ability of railroads to buy cars which the Commission said they would be forced to buy. It called attention to the fact that the Commission's main witness considered economic impact to be irrelevant to the proceedings (J.S., pp. 20-21). It may be noted in passing that this omission by the Commission and the ruling of the Court below on this point was not considered or even mentioned by the Florida court.

Furthermore, in Ex Parte No. 252, *Incentive Per Diem Charges, supra,* as the Examiner noted in his report, the Commission set forth certain factors it deemed necessary to consider under section 1(14)(a) of the Interstate Commerce Act for any determination as to the adequacy of the freight car fleet (Examiner's Report, p. 17). Not a single one of those factors is mentioned or discussed in the Commission's report and the absence thereof is not explained. There are no findings or discussion whatsoever to explain why the Commission has suddenly departed from such standards.[6]

An administrative agency is not prohibited from modifying or changing its regulatory policy. However, both common sense and precedent dictate that especially rigorous standards of clarity and rationality should be required by the courts where the agency has dealt with the issues at hand in a fashion inconsistent with previous cases. The Commission "has not adequately explained its departure from prior norms." *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954). The concern of the District Court below over the Commission's failure is similar to the surprise expressed by the Court of Appeals in *Marine Space Enclosures, Inc.* v. *F. M. C.,* 420 F. 2d. 577, 585 (1969),

---

[6] The Court below was disturbed and concerned over the lack of articulation and explanation in the Commission's report. (J.S., p. 18, 20-21)

over that Commission's departure in an opinion which "offers the sparsest of findings and speaks in the most conclusory terms".

The District Court below approached this case with full awareness of and responsiveness to the court's role in the review of an administrative agency decision. Reviewing courts are not obliged to stand aside and rubber stamp administrative decisions. *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291-(1965). If the findings are inadequate or improper the court is powerless to affirm the administrative action. The court is not expected "to chisel that which must be precise from what the agency has left vague and indecisive." *S.E.C.* v. *Chenery Corp.,* 332 U.S. 194, 196-197 (1947).

The District Court below also was concerned about, but did not rule upon, the constitutional question raised by mandatory rules which have the effect of law and when there cannot be more than eighty percent compliance (J.S., p. 25). The Government does not deny the inability to fully comply with the mandatory rules, nor does it deny that criminal penalties would be applicable for violations of the rules. It merely states that criminal penalties do not automatically attach to every instance of non-compliance, since criminal intent has to be proven (J.S., p. 11). Notwithstanding this, civil forfeitures are also applicable and could be sought in every instance of non-compliance, whether willful or not. In the case cited by the Government, *United States* v. *Southern Ry. Co.,* 250 F. Supp. 759, 770 (D.S.C. 1966), reversed on other grounds, 380 F. 2d. 49, the court, referring to the emergency car service order there involved, pointed out that seeking penalties "where compliance has not been reasonably possible will not advance the Order's aim" and that adding "an unconscionable monetary penalty to the misfortune that prevented the carrier's compliance with the strict mandate . . . cannot promote speed of car handling".

Another salient aspect of the review of the record by the

District Court below (and absent from the Florida court's review) was its consideration and discussion of the Examiner's recommended report (J.S., pp. 18-19). The Commission's report merely recognized the existence of the Examiner's report by stating little more than that, "our conclusions differ in part from those recommended" (J.S., pp. 28-29). The Examiner's report was a detailed review of the evidence and issues in the proceeding, and the fact that the Commission disagreed with it does not decry the significance or value of that report. *Retail Store Employees* v. *N.L.R.B.*, 360 F. 2d 494, 496 (1965). Under the Administrative Procedure Act, the Examiner's recommended report, whether or not adopted by the agency, becomes a part of the record (5 U.S.C. § 557(c)), and on review the courts must look at the "whole record" (5 U.S.C. § 706), including the Examiner's report. *Stanislaus County* v. *United States*, 236 F. Supp. 146, 148 (N.D. Cal. 1964); *Universal Camera Corp., supra*, p. 493.

The Florida court's opinion gives rise to grave doubt that its review comports with this Court's decision in *Universal Camera Corp., supra.* Its failure to deal with the Examiner's report clearly indicates that its determination was not predicated upon review of the "record as a whole." Referring to the Examiner's findings as simply things he was "asserting", it disposed of his report in a single sentence (J.S., p. 186). Apparently that court considered the Commission's disagreement as disposing of the Examiner's report. The fact is that such is not the case and, in view of the diametrically opposite findings of the Commission, the Examiner's report assumes greater significance and should have been dealt with by the Florida court. In *Universal Camera Corp., supra*, p. 497, this Court reversed the Court of Appeals for accepting that Board's rejection of an examiner's report and remanded with direction to accord the examiner's report the relevance it reasonably commanded in answering the comprehensive question

whether, upon the entire record, the evidence supporting the Board's order was substantial. In the case at bar, the Examiner even commented on the inability of the Commission's witnesses to stand cross-examination in connection with their proposal of mandatory car service rules (Examiner's Report p. 23).

While the Florida court accepted the representations of counsel as evidence of record, the specifics cited by Commission counsel do not correspond to the matters described by the Commission in its report, they were not made known at the hearing before the Commission. Counsel's "post-hoc rationalizations" may not be used to explain what the Commission had in mind. *Burlington Truck Lines* v. *United States, supra,* p. 168 (1962); *Securities & Exchange Comm'n* v. *Chenery Corp., supra,* p. 196. This Court many years ago held that "[f]acts conceivably known to the Commission but not put in evidence will not support an order." *Chicago Junction Case,* 264 U.S. 258, 263 (1924); *Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.,* 227 U.S. 88, 93 (1913). Nor, having rested its decision on matters *de hors* the record, is there any saving grace in later identifying such matters.

The Government incorrectly states that "[t]he rules at issue govern the disposition of freight cars of *all* the nation's railroads" (J.S., p. 7) (emphasis added). It argues that "[s]uch rules must be uniformly applied to all railroads to avoid discrimination and inequities." The Commission stated in its report that it would require the rules to be observed by "all carriers at all times" (J.S., p. 62). The truth of the matter is that the Commission's order prescribing mandatory Car Service Rules 1 and 2 will apply only to those railroads named as respondents in such order (App. A., *infra,* pp. 22-28 and J.S., p. 167). This type of error in a Commission report and accompanying order is similar to that found by this Court to be fatal in *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U.S. 80, 96 (1931).

The respondent railroads subject to the Commission's prescription of mandatory Car Service Rules 1 and 2 would be placed at a highly competitive disadvantage, operation-wise and cost-wise, with the many railroads not subject to the order and with other modes of transportation, particularly motor carriers. Under such circumstances, the Commission's order does not provide for "fair and impartial regulation" as required by the National Transportation Policy. (App. C, *infra*).

CONCLUSION

For the foregoing reasons, the judgment of the District Court below should be affirmed.

Respectfully submitted,

WILLIAM M. MOLONEY
JAMES I. COLLIER, JR.
1920 L. Street, N. W.
Washington, D.C. 20036

GORDON E. NEUENSCHWANDER
P. & L. E. Terminal
Pittsburgh, Pennsylvania 15219

Attorneys for Appellee
Association of American Railroads

October, 1971

APPENDIX A

SERVICE DATE
AUGUST 11, 1964

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 29th day of July, A. D. 1964.

Ex Parte No. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

NOTICE OF PROPOSED RULE MAKING
(49 CFR 95-97)

Upon consideration of the record in this proceeding, including the conclusions reached in the report decided June 18, 1964, 323 I.C.C. 48:

It is ordered, That under authority of Part I of the Interstate Commerce Act (49 U.S.C. 1, et seq.), more particularly Sections 1(13) and (14)(a) and 13(2) thereof, and Section 4 of the Administrative Procedure Act (5 U.S.C. 1003), this proceeding be, and it is hereby, broadened for the purpose of obtaining detailed and precise information on all phases of freight car ownership, utilization, distribution, rules and practices which in any manner contribute to or affect the chronic freight car shortage problem, with the

view (1) to consideration of the prescription of rules designed to alleviate the problem and (2) to consideration of the issuance of an order or direction under the provisions of Section 1(13) of the Interstate Commerce Act.

It is further ordered, That all railroads listed in Appendix A hereto be, and they are hereby, made respondents in this proceeding; and that all other railroads (some Class II and switching and terminal companies) made respondents by the order of December 20, 1963, be, and they are hereby, relieved of any further obligation to participate as respondents in this proceeding.

It is further ordered, That the Bureau of Inquiry and Compliance of this Commission be, and it is hereby, authorized to participate in this proceeding.

It is further ordered, That the procedure to be followed shall be:

1. Prior to January 1, 1965, the respondents listed in Appendix A attached hereto shall supply the information outlined in Sections I through XIII of the instructions attached hereto as Appendix B, by completing and filing with the Commission at its office in Washington, D.C., seven copies of the forms attached hereto as Appendices C and D.

2. Prior to June 1, 1965, all respondents listed in Appendix A hereto shall supply the information outlined in Sections XIV through XVI of the said instructions attached as Appendix B by completing, filing and serving as specified in 1 above the forms attached hereto as Appendices E and F.

3. Prior to January 1, 1965, any person desiring to participate in this proceeding must notify the Secretary of this Commission by letter to that effect, giving his name, address, and company or group represented. After that date no additional interventions will be allowed except by

special permission and for good cause shown. To conserve time and avoid expense it is strongly urged that persons having common interests, endeavor to consolidate their presentation to the greatest extent possible. Individual participation is not precluded; mere casual interest, however, does not justify participation, and will make the service of verified statements burdensome and impracticable. The Commission desires participation only by those who intend to take an active part in the proceeding.

4. As soon as practicable after January 1, 1965, the Commission will serve a list of the names and addresses of all persons upon whom service of all verified statements, replies or other pleadings hereinafter specified must, unless waived, be made. An original (signed in ink) and 20 copies of each verified statement, reply or pleading shall be filed with the Commission and a copy of each such statement, reply or other pleading shall be served on each person named in the list prepared and served pursuant to this paragraph in accordance with Rule 1.22 of the Commission's General Rules of Practice.

5. Prior to July 1, 1965, any party to the proceeding may file and serve a verified [1] statement of relevant facts and any argument he desires to make. Where both facts and argument are included in the same document, they shall be set forth under separate headings. Such document should, where appropriate, contain a discussion of any proposed rules including a detailed justification therefor, a discussion of the proper formula or formulas to be used in determining the adequacy of freight car ownership by type by individual carrier, and a discussion by respondents of the subjects listed in Appendix G.

[1] In lieu of verification under oath, the statements and replies may be made subject to the following declaration: "I solemnly declare that I have examined the foregoing statement (or reply) and that to the best of my knowledge and belief the representations of fact contained therein are true." (Signature)

6. Prior to August 1, 1965, any party may file replies to the initial statements.

7. Prior to September 1, 1965, any party may file and serve a request for oral hearing, together with justification therefor. Any reply thereto must be filed prior to September 15, 1965.

8. Postponement of the above specified time schedule is not contemplated and will not be granted except upon detailed justification.

9. Only such documents and pleadings as are specifically permitted under these rules may be filed.

And it is further ordered, That a copy of this order and 10 additional copies of Appendices C, D, E and F shall be served upon each respondent; that a copy of this order be served on the public utility commissions or boards or similar regulatory bodies of each State; that a copy be posted in the office of the Secretary of this Commission; that a copy be served on the Association of American Railroads, Car Service Division, and upon The American Short Line Railroad Association, and that a copy be delivered to the Director, Division of Federal Register, for publication in the Federal Register.

By the Commission, Division 3.

HAROLD D. MCCOY

Secretary

(SEAL)

Appendix A—Ex Parte No. 241

Class I Railroads

Akron, Canton & Youngstown RR.
Ann Arbor RR.
Atchison, Topeka & Santa Fe Ry.
Atlanta & St. Andrews Bay Ry.
Atlanta & West Point RR.—Western Ry. of Alabama
Atlantic Coast Line RR.
Baltimore & Ohio RR.
Bangor & Aroostook RR.
Bessemer & Lake Erie RR.
Boston & Maine RR.
Central of Georgia Ry.
Central RR. Co. of New Jersey
Central Vermont Ry., Inc.
Chesapeake & Ohio Ry.
Chicago & Eastern Illinois RR.
Chicago & Illinois Midland Ry.
Chicago & North Western Ry. System
Chicago, Burlington & Quincy RR.
Chicago Great Western Ry.
Chicago, Milwaukee, St. Paul & Pacific RR.
Chicago, Rock Island & Pacific RR.
Clinchfield RR.
Colorado & Southern Ry. System
Colorado & Wyoming Ry.
Delaware & Hudson RR.
Denver & Rio Grande Western RR.
Detroit & Toledo Shore Line RR.
Detroit, Toledo & Ironton RR.
Duluth, Missabe & Iron Range Ry.
Duluth, Winnipeg & Pacific Ry.
Elgin, Joliet & Eastern Ry.
Erie-Lackawanna RR.
Florida East Coast Ry.
Georgia RR.

Georgia & Florida RR.
Grand Trunk Western RR.
Great Northern Ry.
Green Bay & Western RR. (Inc. KGB&W)
Gulf, Mobile & Ohio RR.
Illinois Central RR.
Illinois Terminal RR.
Kansas City Southern Ry. (Inc. L&A)
Kansas, Oklahoma & Gulf Ry. (MV & OC-A-A)
Lake Superior & Ishpeming RR.
Lehigh & Hudson River Ry.
Lehigh Valley RR.
Long Island RR.
Louisville & Nashville RR.
Maine Central RR.
Minneapolis, Northfield & Southern Ry.
Missouri-Illinois RR.
Missouri-Kansas-Texas RR.
Missouri Pacific RR.
Monon RR.
Monongahela Ry.
New York Central RR. System
New York, Chicago & St. Louis RR.
New York Connecting RR.
New York, New Haven & Hartford RR.
New York, Susquehanna & Western RR.
Norfolk & Western Ry.
Norfolk Southern Ry.
Northern Pacific Ry.
Pennsylvania RR.
Pennsylvania-Reading Seashore Lines
Piedmont & Northern Ry.
Pittsburgh & Lake Erie RR.
Pittsburgh & West Virginia Ry.
Reading
Richmond, Fredericksburg & Potomac R.R.
St. Louis-San Francisco Ry. (Inc. QA&P)

St. Louis Southwestern Ry.
Savannah & Atlanta Ry.
Seaboard Air Line RR.
Soo Line RR.
Southern Pacific System
Southern Ry. System
Spokane International RR.
Spokane, Portland & Seattle Ry.
Staten Island Rapid Transit Ry.
Tennessee Central Ry.
Texas & Pacific Ry.
Texas Mexican Ry.
Toledo, Peoria & Western RR.
Union Pacific RR.
Wabash RR.
Western Maryland Ry.
Western Pacific R.R.

Appendix A—Ex Parte No. 241

Class II Railroads

Aberdeen & Rockfish RR.
Algers, Winslow & Western Ry.
Angelina & Neches River RR.
Apache Ry.
Apalachicola Northern RR.
Arkansas & Louisiana Missouri Ry.
Ashley, Drew & Northern Ry.
Atlantic & East Carolina Ry.
Bauxite & Northern Ry.
California Western RR.
Camas Prairie RR.
Cambria & Indiana RR.
Cedar Rapids & Iowa City Ry.
Central California Traction Co.
Columbia & Cowlitz Ry.
Columbia, Newberry & Laurens RR.

Columbus & Greenville Ry.
Corinth & Counce RR.
Des Moines & Central Iowa Ry.
Detroit & Mackinac Ry.
Duluth & Northeastern RR.
Durham & Southern Ry.
Escanaba & Lake Superior RR.
Ft. Dodge, Des Moines & Southern Ry.
Gainesville Midland RR.
Genessee & Wyoming RR.
Georgia Northern Ry.
Great Western Ry.
Interstate RR.
Kewaunee, Green Bay & Western RR.
Lake Erie, Franklin & Clarion RR.
Lancaster & Chester Ry.
Live Oak, Perry & Gulf RR.
Longview, Portland & Northern RR.
Louisiana & North West RR.
Louisiana Midland Ry.
Marinette, Tomahawk & Western RR.
McCloud River RR.
Meridian & Bigbee RR.
Minnesota, Dakota & Western Ry.
Mississippi Central RR.
Mississippi Export RR.
Montour RR.
Nevada Northern Ry.
New Orleans & Lower Coast RR.
Norfolk, Franklin and Danville Ry.
North Louisiana & Gulf RR.
Northeast Oklahoma RR.
Oregon & Northwestern RR.
Oregon, Pacific & Eastern Ry.
Pittsburg & Shawmut RR.
Pittsburgh, Chartiers & Youghiogheny Ry.
Point Comfort & Northern Ry.

Port Huron & Detroit RR.
Portland Traction Co.
Raritan River RR.
Roscoe, Snyder & Pacific Ry.
Sacramento Northern Ry.
St. Johnsbury & Lamoille County RR.
St. Marys RR.
Sandersville RR.
Sands Spring Ry.
Santa Maria Valley RR.
Tennessee, Alabama & Georgia Ry.
Tennessee RR.
Texas & New Mexico Ry.
Texas & Northern Ry.
Tidewater Southern Ry.
Trona Ry.
Utah Ry.
Valdosta Southern RR.
Washington & Old Dominion RR.
Waterloo RR.
West Virginia Northern RR.
Winston-Salem Southbound Ry.

Appendix A—Ex Parte No. 241

Switching and Terminal Companies.

Akron & Barberton Belt RR.
Aliquippa & Southern RR.
Alton & Southern RR.
Baltimore & Ohio Chicago Terminal RR.
Belt Ry. of Chicago
Birmingham Southern RR.
Brooklyn Eastern District Terminal
Buffalo Creek RR.
Bush Terminal RR.
Canton RR.
Chicago & Illinois Western RR.

Chicago Heights Terminal Transfer Co.
Chicago River & Indiana RR.
Chicago, West Pullman & Southern RR.
Conemaugh & Black Lick RR.
Cuyahoga Valley Ry.
Delray Connecting RR.
Detroit Terminal RR.
Fairport, Painesville & Eastern RR.
Houston Belt & Terminal Ry.
Illinois Northern Ry.
Indiana Harbor Belt RR.
Kansas City Terminal Ry.
Kentucky & Indiana Terminal RR.
Lake Erie & Eastern RR.
Lake Terminal RR.
Lakefront Dock & RR. Terminal
Los Angeles Junction Ry.
Manufacturers Connecting RR.
McKeesport Connecting RR.
Modesto & Empire Traction Co.
Monongahela Connecting RR.
Newburgh & South Shore Ry.
New Orleans Public Belt RR.
New Orleans Terminal Co.
New York Dock RR.
Norfolk & Portsmouth Belt Line RR.
Patapsco & Back Rivers RR.
Peoria & Pekin Union Ry.
Philadelphia, Bethlehem & New England
Pittsburgh & Ohio Valley Ry.
Railroad of New Orleans
River Terminal Ry.
St. Johns River Terminal Co.
South Buffalo Ry.
South Omaha Terminal Ry.
Steelton & Highspire RR.
Terminal Railroad Association of St. Louis

Terminal Ry. Alabama State Docks
Texas City Terminal Ry.
Texas Pacific-Missouri Pacific Terminal
Toledo Terminal RR.
Union RR (Pennsylvania)
Union Ry. (Memphis, Tenn.)
Union Terminal Ry. (St. Joseph, Mo.)
Upper Merion & Plymouth RR.
Wyandotte Terminal RR.
Youngstown & Northern RR.

(Other appendices to order not reproduced)

APPENDIX B

ORDER

Interstate Commerce Commission

EX PARTE NO. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

EX PARTE NO. 252

INCENTIVE PER DIEM CHARGES

IN THE MATTER OF THE MOTION FILED AUGUST 5, 1966 BY SOUTHERN RAILWAY COMPANY AND AFFILIATED LINES

PRESENT: John W. Bush, Chairman, and Rupert L. Murphy, Commissioner, to whom the matters which are the subject of this order have been assigned for action thereon.

Upon consideration of the motion filed on August 5, 1966, on behalf of Southern Railway Company and affiliated lines for consolidation of the two above-entitled proceedings and for other relief, and the letter requests of The Long Island Rail Road and The Boston and Maine Corporation, et al, for extension of time to reply to the motion:

It is ordered, That the motion be, and it is hereby, denied for the reason that it does not present sufficient grounds to warrant granting the action sought; without prejudice, however, to the renewal before the Hearing Examiner of that portion concerning objection to the taking of official notice in Ex Parte No. 252 of the record in Ex Parte No. 241.

Dated at Washington, D.C., this 23rd day of August, A.D. 1966.

By the Commission, Chairman Bush and Commissioner Murphy.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX C

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001*]. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SUPREME COURT, U. S.

FILED

OCT 15 1971

E. ROBERT SEAVER, CLERK

No. 71-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania

---

MOTION TO AFFIRM OF ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.

MAX O. TRUITT, JR.
SALLY KATZEN
WILMER, CUTLER & PICKERING
900 - 17th Street, N. W.
Washington, D. C. 20006

Counsel for Allegheny-Ludlum Steel Corporation, et al.

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
STATEMENT	2
ARGUMENT	7
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:

Baltimore & Ohio R.R. v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87	11
Burlington Truck Lines v. *United States*, 371 U.S. 156	10, 11
Florida East Coast Ry. v. *United States*, 327 F. Supp. 1076	6
Iversen v. *United States*, 63 F. Supp. 1001, *aff'd per curiam*, 327 U.S. 767	11
Layne & Bowler Corp. v. *Western Well Works, Inc.*, 261 U.S. 387	14
Palmer v. *United States*, 75 F. Supp. 63	9, 10
Schaffer Transportation Co. v. *United States*, 355 U.S. 83	11
SEC v. *Chenery Corp.*, 318 U.S. 80	10
Universal Camera Corp. v. *NLRB*, 340 U.S. 474	6
United States v. *Cohen Grocery Co.*, 255 U.S. 81	12
Watkins v. *United States*, 354 U.S. 178	13
Yonkers v. *United States*, 320 U.S. 685	10

Statutes:

Administrative Procedure Act	
5 U.S.C. § 557	4
Interstate Commerce Act	
§ 1(14)(a), 49 U.S.C. § 1(14)(a)	3, 7
§ 1(17), 49 U.S.C. § 1(17)	12
§ 10, 49 U.S.C. § 10	12
§ 41(1), 49 U.S.C. § 41(1)	12

Miscellaneous:

	Page
Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices, 323 I.C.C. 48	3
29 Fed. Reg. 119	2, 3
29 Fed. Reg. 11653	3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-227

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees American Iron and Steel Institute ("Institute") and 15 steel producers[1] hereby move that the judgment of the district court be affirmed.

---

[1] Appellees steel producers are Allegheny-Ludlum Steel Corporation, Division of Allegheny-Ludlum Industries, Inc.; Armco Steel Corporation; Bethlehem Steel Corporation; Granite City Steel Company; Inland Steel Company; Jones and Laughlin Steel Corporation; Kaiser Steel Corporation; Laclede Steel Company; Lukens Steel Company; National Steel Corporation; Republic Steel Corporation; Sharon Steel Corporation; United States Steel Corporation; Wheeling-Pittsburgh Steel Corporation; and Youngstown Sheet and Tube Company.